

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ENRIQUE HAMES-HERRERA,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION
SERVICE,

Respondent.

NO. 22685

APPELLANT'S OPENING BRIEF

APPEARANCES:

GRIFFIN & GRIFFIN

RICHARD T. GRIFFIN, Esq.

301 East Colorado Boulevard
Suite 502

Pasadena, California

(213) 684-2810

Attorneys for Petitioner

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TOPICAL INDEX

	<u>Page</u>
TABLE OF AUTHORITIES CITED	ii
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	3
ARGUMENT	4



TABLE OF AUTHORITIES CITED

STATUTESPage

Immigration and Nationality Act,
Section 106(a)(5), 8 U.S. C.
1105a(a)(5)

1,2,3,
4

CASES

Pignatello vs. Attorney General of the
United States (1965), 350 F.2d,719,
723 (2nd Cir.)

4

Rassano vs. Immigration and Naturalization
Service (1967) 377 F.2d 971,972
(7th Cir.)

4,5



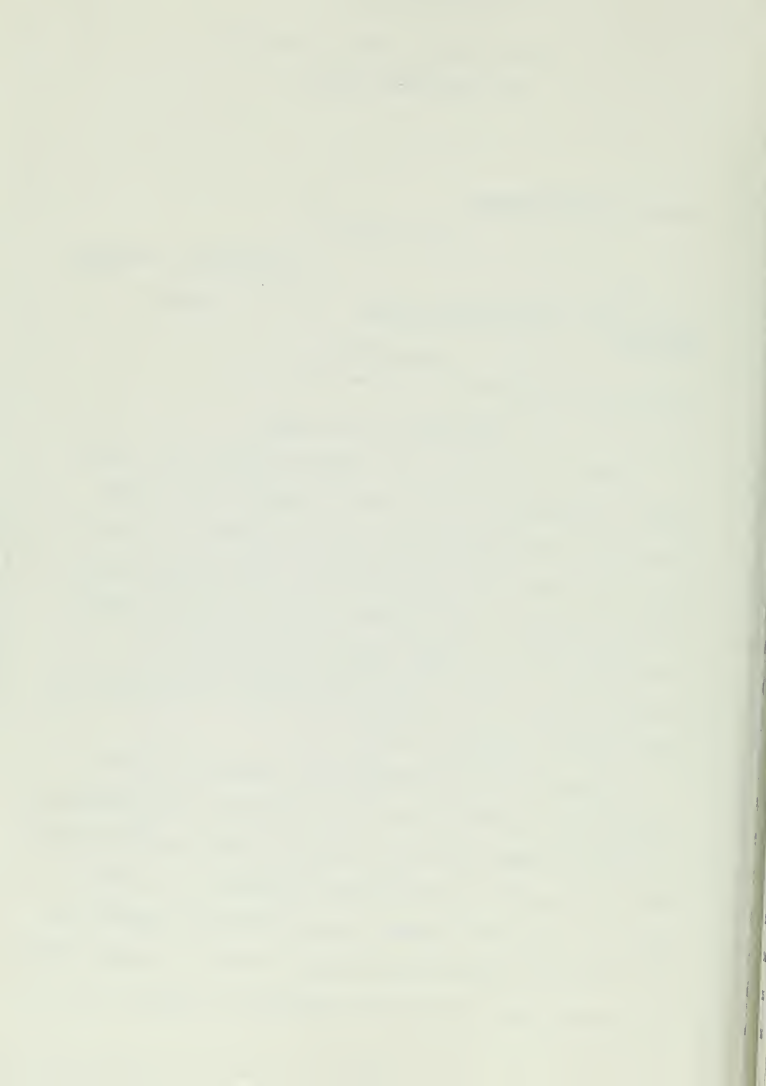
1 UNITED STATES COURT OF APPEALS
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5 ENRIQUE JAMES-HERRERA,)
6)
7 vs.) Petitioner,)
8) APPELLANT'S OPENING
9 IMMIGRATION AND NATURALIZATION)
0 SERVICE,) BRIEF
1 Respondent.)
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1 STATEMENT OF THE CASE

2 This is an action for judicial review of a final
3 order of deportation pursuant to Section 106 of the
4 Immigration and Nationality Act, as amended, 8 U.S.C.
5 1105a, and for a de novo hearing in the United States
6 District Court on petitioner's claim to United States
7 citizenship (Tr. of Adm. Record, P.82) pursuant to
8 Section 106(a)(5)(B) of the Immigration and Nationality
9 Act, 8 U.S.C. 1105a(a)(5)(B).
0

1 Deportation proceedings were commenced by the
2 Immigration and Naturalization Service by the issuance of
3 an Order to Show Cause and Notice of Hearing dated Decem-
4 ber 22, 1965 (Tr. of Adm. Record, Exhibit 1, p. 139). On
5 April 25, 1966 the Special Inquiry Officer rendered his
6 oral decision denying petitioner's claim to United States
7 citizenship and ordering him deported to Mexico (Tr. of
8
9
0



Adm. Record, p. 67). An appeal was taken from that decision by petitioner to the Board of Immigration of Appeals (Tr. of Adm. Record, p. 66), who directed that the deportation proceedings be reopened to make further search of military and birth records pertaining to petitioner's father (Tr. of Adm. Record, p. 53). On May 18, 1967, following reopened proceedings, the Special Inquiry Officer rendered his oral decision again denying petitioner's claim of United States citizenship (Tr. of Adm. Record, p. 19). That decision was appealed to the Board of Immigration Appeals (Tr. of Adm. Record, P. 18). On January 16, 1968 the Board of Immigration Appeals rendered its decision sustaining the order of the Special Inquiry Officer made on May 18, 1967 and petitioner's appeal was dismissed (Tr. of Adm. Record, P.2). Said order of the Special Inquiry Officer is now final.

This Petition for Review is filed pursuant to Section 106(a)(5) of the Immigration and Nationality Act, as amended, (8 U. S. C. 1105a(a)(5)) to obtain a de novo hearing in the United States District Court on petitioner's claim that he is a national of the United States.

Section 106(a)(5) of the Immigration and Nationality Act, as amended, (8 U.S.C. 1105a(a)(5)) provides as follows:

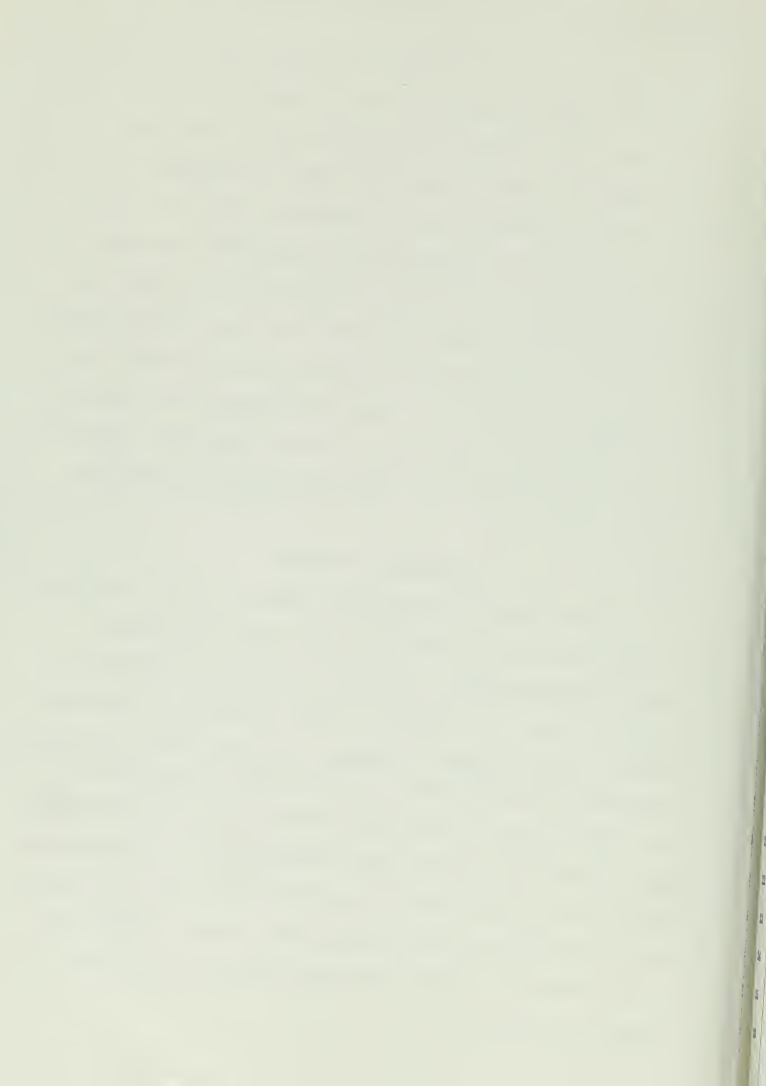
"(5) [W]henever any petitioner, who seeks review of an order under this section, claims to be a national of the United States and makes a showing that his

claim is not frivolous, the court shall (A) pass upon the issues presented when it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or (B) where a genuine issue of material fact as to the petitioner's nationality is presented, transfer the proceedings to a United States district court for the district where the petitioner has his residence for hearing de novo of the nationality claim and determination as if such proceedings were originally initiated in the district court under the provisions of section 2201 of title 28, United States Code.

* * *

STATEMENT OF FACTS

Petitioner predicates his claim to being a national of the United States upon the fact that his father, ENRIQUE HAMES-ROMERO, was born in the United States on March 2, 1907. In support of this contention petitioner's mother, PILAR HERRERA de HAMES, testified that on numerous occasions the petitioner's father had informed her that he was born in the in the United States, (Tr. of Adm. Record, pp. 96, 99), and that he had served in the United States Navy (Tr. of Adm. Record, pp. 96-97, 103-104). In addition, petitioner's birth certificate (Tr. of Adm. Record, Ex. 3, pp. 144-147) recites that his father was from San Diego, California.



ARGUMENT

The sole issue in dispute in these proceedings is whether or not petitioner is a national of the United States. That issue having been resolved against him in the administrative proceedings, he is entitled to a judicial determination thereof in the District Court. The only condition upon this right is that his claim to being a national of the United States not be frivolous. Section 106(a)(5) I. & N. Act, 8 U.S.C. 1105a(a)(5), supra.

It is the function of the Appellate Court on direct appeal from the final deportation order to determine whether a genuine issue of material fact is presented by the administrative record -- in this case as to petitioner's alienage. If a genuine fact issue is presented, its function is to transfer the cause to the District Court for a de novo determination of that issue and hold the Petition to Review until that determination is made and certified to the Appellate Court. Rassano vs. Immigration and Naturalization Service, 377 F.2d 971, 972, (1967), U.S.C.A. 7th Cir.

In considering a Petition for Review of a final order of deportation under Section 106(a)(5) (B) of the Immigration and Nationality Act, the Court of Appeals for the Second Circuit stated, in Pignatello vs. Atty. General of the United States, 350 F. 2d 719 (1965) at Page 723:

1 "Section 106(a)(5) codifies, and establishes
2 the procedure for effectuating the constitutional
3 principle announced by Mr. Justice Brandeis
4 in Ng Fung Ho v. White, 259 U.S. 276, 284, 42 S.
5 Ct. 492, 495, 66 L. Ed.938 (1922) -- that the
6 claim of citizenship must be judicially rather
7 than administratively determined since "[j]uris-
8 diction in the executive to order deportation
9 exists only if the person arrested is an alien
10 [and] the claim of citizenship is thus a denial
11 of an essential jurisdictional fact.' Accord:
12 Kessler v. Strecker, 307 U. S. 22, 34-35, 59
13 S. Ct. 694, 83 L.Ed. 1082 (1939). It is not
14 inconsistent with this principle to require,
15 as the statute does, that there be a modicum of
16 substantiality to the claim of citizenship.
17 However, what the petitioner is seeking, and is
18 entitled to, is a de novo judicial determination
19 of the claim, not judicial review of the admin-
20 istrative disposition of that claim. Thus what
21 section 106(a)(5) requires, as a condition of a
22 de novo judicial determination of the claim
23 of citizenship, is nothing more than that the
24 claim not be frivolous. * * *

25 That the petitioner's claim to being a national of
26 the United States is not frivolous may readily be seen

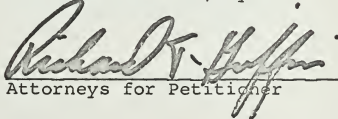
1 by examination of the administrative record, the bulk of
2 which relates specifically to that claim, including two
3 appeals to the Board of Immigration Appeals. The
4 petitioner's claim to being a national of the United States
5 has been denied administratively. Under the authorities
6 cited he is entitled to a judicial determination of that
7 issue.

8 It is respectfully submitted that a genuine issue of
9 material fact as to the petitioner's nationality is pre-
10 sented, that petitioner's claim to being a national of
11 the United States is not frivolous, and that these pro-
12 ceedings should be transferred to the United States
13 District Court for hearing and determination thereof,
14 pursuant to Section 106(a)(5)(B).

15 I certify that, in connection with the preparation
16 of this brief, I have examined Rules 18, 19 and 39 of
17 the United States Court of Appeals for the Ninth Circuit,
18 and that, in my opinion, the foregoing brief is in full
19 compliance with those rules.

20 Dated: June 10, 1968.

21 GRIFFIN & GRIFFIN, by:

22 
23 Attorneys for Petitioner
24
25
26

1 STATE OF CALIFORNIA)
2) ss
3 COUNTY OF LOS ANGELES)

4 I, Ann Huglin, being duly sworn depose and say:

5 I am a citizen of the United States, and a resident
6 of the County aforesaid; I am over the age of 18 years
7 and not a party to the within entitled action; my
8 business address is 301 E. Colorado Boulevard, Pasadena,
9 California 91101. On June 10, 1968 I served the within
10 Appellant's Opening Brief on the Respondent in said
11 action, by placing 3 true copies thereof in a sealed
12 envelope with postage thereon fully prepaid, in the
13 United States mail at Pasadena, California, addressed
14 as follows:

15 United States Attorney
16 312 North Spring Street
17 Los Angeles, California 90012

18 Attention: Mrs. Caroline M. Reynolds.

19 Ann Huglin

20 Subscribed and sworn to before me this 10th day
21 of June, 1968.

22 Richard T. Griffin
23 Notary Public in and for
24 said County and State

